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No. 03-1197

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM GROSJEAN,

Petitioner,

v.

FIRSTENERGY CORP. and TOLEDO EDISON COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent FirstEnergy Corp. is a publicly owned Ohio corporation. The Toledo Edison Company, an Ohio corporation, is a wholly owned subsidiary of FirstEnergy Corp.

TABLE OF CONTENTS

	Page
Statement Pursuant To Rule 29.6	i
Table Of Contents	ii
Table Of Cited Authorities	iii
Statement Of The Case	1
Statement Of The Facts	2
Summary Of The Argument	4
Reasons For Denying The Petition	5
I. Grosjean's Question Presented On The Issue Of *McDonnell Douglas* Was Never Raised Below. In Any Event, The Argument Has No Merit.	5
II. The Bright Line Test Established By The Court Does Not Require Review By This Court.	8
Conclusion	15

TABLE OF CITED AUTHORITIES

CASES *Page*

Barnett v. Department of Veterans Affairs, 153 F.3d 338 (6th Cir. 1998) 11

Baron v. City of Highland Park, 195 F.3d 333 (7th Cir. 1999) 11

Bennington v. Caterpillar, Inc., 275 F.3d 654 (7th Cir. 2001) 13

Brown v. Metropolitan Opera Ass'n, 192 F.3d 310 (2d Cir. 1999) 11

Burns v. AAF-McQuay, Inc., 96 F.3d 728 (4th Cir. 1996) 6-7

Bush v. Dictaphone Corp., 161 F.3d 363 (6th Cir. 1998) 7, 11

Carlton v. Mystic Transp., 202 F.3d 129 (2d Cir. 2000) 11

Coryell v. Bank One Trust Co., N.A., 101 Ohio St.3d 175, 803 N.E.2d 781 (2004) 12

Cramer v. Intelidata Techs. Corp., 168 F.3d 481, 1998 WL 911735 (4th Cir. 1998) 11

Dunaway v. International Brotherhood of Teamsters, 310 F.3d 758 (D.C.Cir. 2002) 7, 11

Cited Authorities

Page

EEOC v. Board of Regents of Univ. of Wisc. Sys., 288 F.3d 296 (7th Cir. 2002) 11

General Dynamics Land Systems v. Cline, 124 S. Ct. 1236 (2004) 12

Girten v. McRentals, Inc., 337 F.3d 979 (8th Cir. 2003) 7

Hartley v. Wisconsin Bell, 124 F.3d 887 (7th Cir. 1997) 10, 13

Hoffman v. Primedia Special Interest Publications, 217 F.3d 522 (7th Cir. 2000) 7

Keathley v. Ameritech Corp., 187 F.3d 915 (8th Cir. 1999) 11

Miller v. Borden, 168 F.3d 308 (7th Cir. 1999) 11

Munoz v. St. Mary-Corwin Hosp., 221 F.3d 1160 (10th Cir. 2000) 7, 11

Nidds v. Schindler Elevator Corp., 113 F.3d 912 (9th Cir. 1996) 11

O'Connor v. Consolidated Coin Catering, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996) ..... *passim*

Cited Authorities

Page

O'Connor v. DePaul Univ., 123 F.3d 665 (7th Cir. 1997) 11

Radue v. Kimberly-Clark Corp., 219 F.3d 612 (7th Cir. 2000) 11, 13

Reeves v. Sanderson Plumbing, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) 4-5, 6

Roxas v. Presentation Coll., 90 F.3d 310 (8th Cir. 1996) 11

Schiltz v. Burlington N. R.R., 115 F.3d 1407 (8th Cir. 1997) 11

Sempier v. Johnson & Higgins, 45 F.3d 724 (3d Cir. 1995) 11

Showalter v. University of Pittsburgh Med. Ctr., 190 F.3d 231 (3d Cir. 1999) 11

Steiner v. Envirosource, Inc., 134 F. Supp. 2d 910 (N.D.Ohio 2001) 7

Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) 6

Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977) 14

Cited Authorities

Page

Weigel v. Baptist Hosp., 302 F.3d 367 (6th Cir. 2002) 11

Williams v. Raytheon Co., 220 F.3d 16 (1st Cir. 2000) 6, 11, 13

Woodsmall v. Eclipse Mfg. Co., Inc., 249 F. Supp. 2d 918 (E.D.Tenn. 2002) 7

STATUTES

29 U.S.C. § 621 (Age Discrimination in Employment Act) 1

Ohio Revised Code Chapter 4112 12

Ohio Revised Code § 4112.01 1

RULE

Federal Rule of Civil Procedure 56 9

STATEMENT OF THE CASE

Petitioner William Grosjean filed a complaint against Respondents FirstEnergy Corp. and Toledo Edison Company (collectively "FirstEnergy") in the United States District Court for the Northern District of Ohio on May 2, 2001, alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* and Ohio's analogous anti-discrimination statute, Ohio Revised Code §§ 4112.01, *et seq.* He alleged a discriminatory demotion and a discriminatory failure to rehire as well as a discriminatory denial of a bonus. On February 22, 2002, after full briefing by the parties, the district court granted summary judgment to FirstEnergy on the basis that Grosjean had failed to rebut FirstEnergy's legitimate non-discriminatory reasons for its actions which were his abysmal performance and failure to improve. Contrary to Grosjean's assertion at page 7 of his Petition, FirstEnergy argued that Grosjean was not replaced by a substantially younger employee under the fourth prong of the prima facie test in its motion for summary judgment (page 16 of Motion for Summary Judgment) at the district court and on appeal. (page 30 of Appellee Brief.)

Grosjean timely appealed to the Sixth Circuit Court of Appeals on the issue of pretext. On November 13, 2003, the Sixth Circuit Court of Appeals affirmed the district court's decision on other grounds. It found that the issue of pretext need not be reached for the simple reason that Grosjean could not make out a prima facie case. Specifically, he could not demonstrate that he was replaced by someone substantially younger. In so ruling, the Sixth Circuit compared the fifty-four year old Grosjean to Dick Riley, his fifty-one year old replacement and found that an age difference of three years was insufficient to raise an inference of age

discrimination. The Court found that Grosjean was actually replaced by Mr. Riley. However, the Court noted that, even if one looked at John Gallagher (the forty-eight year old FirstEnergy employee who temporarily filled Grosjean's position after Grosjean's transfer), no inference of age discrimination was raised.

The Sixth Circuit exhaustively examined case law from other circuits and noted the general rule that age differences of ten years or more are sufficiently substantial to meet the "substantially younger" prong of the age discrimination prima facie case. Additionally, it noted that the "overwhelming body of cases" in the circuits hold that differences of less than ten years are not significant enough to fulfill the "substantially younger" portion of the test. Based upon its examination of the case law and its own precedent, the Sixth Circuit held that an age difference of six years or less between a plaintiff and a replacement employee is not significant in the absence of direct evidence.

STATEMENT OF THE FACTS

Grosjean was fifty-four years old at the time of the events giving rise to the case. He began his employment with FirstEnergy Corp. at its predecessor company Toledo Edison in October 1970. In July 1990 Toledo Edison promoted him to the position of Supervisor-Plant Maintenance. He was subsequently reassigned in June 1998 to Toledo Edison's Bay Shore Power Plant where he supervised yard crews and was responsible for safe, efficient operation and maintenance of the fuel handling facilities. In 1998 Kenneth Dresner became Grosjean's supervisor as director of production. Shortly after Dresner assumed this position, Grosjean was made

Supervisor-Yard and worked for six months with a fellow supervisor, John Gallagher, to train for the position.

Dresner began to have serious concerns about Grosjean's supervisory abilities. Grosjean had, at various times, 1) authorized overtime pay for an employee who had not worked the overtime, violating company policy and the employee's collective bargaining agreement, 2) scheduled another employee for unnecessary overtime, another violation of company policy, and 3) granted unpaid time off to another employee without requiring the necessary medical documentation. This was another violation of company policy as well as a violation of Dresner's direct orders. Grosjean also exhibited difficulty communicating with his subordinates and an unwillingness to address unpopular management decisions, instead referring such questions to Dresner. Grosjean blamed Dresner for difficult decisions, which understandably undermined employee morale and Dresner's authority. Union officials exhibited a reluctance to take matters up with Grosjean, whose responsibility it was to address them.

Dresner counseled Grosjean about poor supervisory performance in July 1999, November 1999, and December 1999. On each occasion they discussed specific mistakes and weaknesses. Each time Dresner instructed Grosjean to improve. In March 2000, Dresner and Grosjean met for Grosjean's annual performance review in which he received a "does not meet expectations" rating. At that time, Dresner informed Grosjean that the company was removing his supervisory responsibilities because he had demonstrated an inability to handle such duties. Grosjean's title did not immediately change and his rate of pay remained the same. At the next performance review following the removal of

his supervisory duties, Grosjean received a "meets expectations" rating from the company.

Grosjean re-applied for his previous supervisory job, but FirstEnergy (which by this time had acquired Toledo Edison) hired no one to fill the position. John Gallagher, who was forty-eight years old, temporarily took over the position. Grosjean once again applied for his previous position after a second posting of the job. FirstEnergy instead hired Dick Riley, a fifty-one year old individual to fill the position. Grosjean remains employed with FirstEnergy today but does not hold supervisory responsibilities.

SUMMARY OF THE ARGUMENT

In his Petition, Petitioner William Grosjean asserts that there are two questions for this Court's review: 1) whether the burden-shifting test under *McDonnell Douglas* remains viable in the age discrimination context, and 2) whether the Sixth Circuit Court of Appeals erred when it established a minimum standard for the "substantially younger" test this Court articulated in *O'Connor v. Consolidated Coin Catering*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996). In so doing, however, Grosjean puts forth no valid legal reason as to why either of these issues requires review by this Court. Instead, he articulates his opinion that the Sixth Circuit and the district court made erroneous factual findings or misapplied a properly stated rule of law. These are insufficient considerations upon which this Court should grant certiorari.

In any event, the Sixth Circuit's decision following a review of Grosjean's case evidences no error. In keeping with this Court's precedent in *O'Connor* and *Reeves v. Sanderson*

Plumbing, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), the district court applied and the Sixth Circuit affirmed the use of the *McDonnell Douglas* burden-shifting framework. Further, the *McDonnell Douglas* burden shifting framework was utilized in both the lower court and upon appellate review, without protest or argument from Grosjean.

With regard to the six-year threshold for the "substantially younger" prong of the *O'Connor* test, the Sixth Circuit simply set a minimum standard to establish a threshold for determination of whether an age discrimination plaintiff has met the minimum burden of the prima facie case where direct evidence is absent. In so doing, it attempted to delineate boundaries to a nebulous concept after performing an exhaustive examination of the federal jurisprudence. The Sixth Circuit in no way foreclosed an ADEA plaintiff from establishing a prima facie case or overcoming the six-year presumption when he or she has direct evidence that age played a part in the employment decision.

REASONS FOR DENYING THE PETITION

I.

GROSJEAN'S QUESTION PRESENTED ON THE ISSUE OF *McDONNELL DOUGLAS* WAS NEVER RAISED BELOW. IN ANY EVENT, THE ARGUMENT HAS NO MERIT.

In his first question presented, Grosjean asks "Is the basic evidentiary framework set forth in *McDonnell Douglas* applicable in the Age Discrimination in Employment Act ("ADEA") context?" This Court is the first forum in which Grosjean has raised this issue. This question was not

addressed below by the Sixth Circuit or the district court because both parties treated the issue as if it were settled law, raising no question about the applicability of the *McDonnell Douglas* framework.

Both this Court and the circuit courts have consistently used *McDonnell Douglas* in age discrimination cases. In *O'Connor v. Consolidated Coin Caterers Corporation*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (1996), this Court used a modified *McDonnell Douglas* burden-shifting test on the assumption that it applied to age discrimination cases. After *O'Connor*, federal courts followed this Court's lead and applied the modified standard consistently when assessing age discrimination cases. Four years later, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), this Court once again stated that although it "has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964 . . . also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, arguendo, that the *McDonnell Douglas* framework is fully applicable here." *Reeves*, 530 U.S. at 142, 120 S. Ct. 2097, 147 L. Ed. 2d 105.

Although this Court has not had occasion to apply *McDonnell Douglas* in the age discrimination context since *Reeves*, lower federal courts have proceeded to do so consistently.[1] *See, e.g., Williams v. Raytheon Co.*, 220 F.3d 16 (1st Cir. 2000); *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728

1. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002), involved the ADEA, but this Court merely articulated the correct pleading standard in discrimination cases.

(4th Cir. 1996); *Bush v. Dictaphone Corp.*, 161 F.3d 363 (6th Cir. 1998); *Hoffman v. Primedia Special Interest Publications*, 217 F.3d 522 (7th Cir. 2000); *Girten v. McRentals, Inc.*, 337 F.3d 979 (8th Cir. 2003); *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160 (10th Cir. 2000); *Dunaway v. International Brotherhood of Teamsters*, 310 F.3d 758 (D.C.Cir. 2002); *Steiner v. Envirosource, Inc.*, 134 F. Supp. 2d 910 (N.D.Ohio 2001); *Woodsmall v. Eclipse Mfg. Co., Inc.*, 249 F. Supp. 2d 918 (E.D.Tenn. 2002).

The *McDonnell Douglas* test is entirely appropriate for assessing a plaintiff's age discrimination case. At its heart, age discrimination is the same as race, sex, or national origin discrimination – a comparison of the treatment of one who is in the protected class (the plaintiff who is older) with one who is not (the replacement who is younger). Without a framework to test the prima facie evidence of a plaintiff, nearly every case would proceed to the legitimate, nondiscriminatory reason and pretext stages. Indeed, under the *O'Connor* "substantially younger" prong, anyone over the age of forty who suffered an adverse employment action and was replaced by someone younger would be entitled to proceed past the prima facie stage.

The "substantially younger" prong is an excellent method by which to delineate cases with merit. One alternative – that one must demonstrate replacement by another person under the age of forty – does not take into account relative ages, and sets up the scenario that a forty-two year old replaced by a thirty-two year old is in a better position in a lawsuit than a fifty-two year old replaced by a forty-two year old. Another alternative, to show he or she is merely older than the replacement, would be so expansive as to be meaningless. The *O'Connor* framework of requiring a showing of substantially younger is the most appropriate test.

II.

THE BRIGHT LINE TEST ESTABLISHED BY THE COURT DOES NOT REQUIRE REVIEW BY THIS COURT.

Grosjean's true complaint is that the six-year test set by the Sixth Circuit was not short enough to protect him. It bears emphasizing that Grosjean actually seeks a factual determination from this Court, as evidenced by his lengthy and argumentative factual recitation. He states that

> [d]espite the ample evidence that Grosjean was replaced by Brad Cloyne, who was in his forties, the Sixth Circuit held that Grosjean was in fact replaced by Riley, who was three (3) years younger than Grosjean, or Gallagher, who was five and a half years (5 ½) years younger than Grosjean, and therefore, that Grosjean was not replaced by an employee who was sufficiently younger.

(Petition, at 9). Grosjean seems to request that this Court articulate a definition for "replacement" or instruct the Sixth Circuit that it erred in its factual determination on the issue of who "replaced" Grosjean.[2] Indeed, he uses terms

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2. In fact, Grosjean barely mentioned Cloyne in his motion for summary judgment, citing in passing the fact that Cloyne may have assumed some of Grosjean's duties after Grosjean was removed from the position. Grosjean states only that Cloyne at some point replaced Gallagher, Grosjean's replacement. (Brief in Opposition to FirstEnergy's Motion for Summary Judgment, at 24-25). Significantly, however, Cloyne was not Grosjean's replacement. *See Grosjean*, 349 F.3d at 336 (noting that replacement does not take place when another employee assumes some duties in addition to other duties or the work is redistributed). The Sixth Circuit correctly found that Grosjean was replaced by the fifty-one year old Riley.

throughout his factual statement such as "arguably," "erroneously," "the Sixth Circuit ignored evidence," "disputed evidence," and "despite ample evidence." (Petition, at 7, 9). These goals of articulating a standard not properly before the court or re-evaluating a lower court's factual determination are not sufficient for a writ to issue.

Grosjean also incorrectly asserts that the requirement that an age difference be "substantial" always presents a question of fact. Grosjean basically postulates that Motions for Summary Judgment under Federal Rule of Civil Procedure 56 are inapplicable to age discrimination cases once it is established that the replacement is younger than the plaintiff (no matter how much younger). Notably, however, he fails to put forth any legal support for the proposition. Instead, his cited cases only reiterate the summary judgment standard – if reasonable minds could differ, a fact finder will have to establish the facts by a preponderance of the evidence.

An age discrimination case is no different than any other discrimination action in which summary judgment is appropriate if the standard under Federal Rule of Civil Procedure 56 is met. Even though the "substantially younger" element is unique to an age discrimination claim, it is equally capable of summary judgment resolution when reasonable minds could not differ that this standard is met. If every age discrimination case was sent to the fact finder where the replacement was younger than the plaintiff (no matter how slight the age difference is) the courts would be overwhelmed with wildly inconsistent results. Accordingly, some guiding principle is necessary such as the one adopted by the Sixth Circuit so that Federal Rule of Civil Procedure 56 can be effectively applied to age discrimination cases.

Grosjean states that the Sixth Circuit's rule means that, unless the age difference is six years or more, a plaintiff loses. This mischaracterizes the Sixth Circuit's decision. The purpose of the prima facie elements is to establish a threshold over which a plaintiff may cross with only an inference. For example, in sex discrimination cases, a qualified woman who was terminated but replaced by another woman, without more, cannot proceed past the prima facie case. Indeed, in any discrimination case that uses the *McDonnell Douglas* framework, a plaintiff never reaches the legitimate nondiscriminatory reason/pretext analysis unless one can demonstrate the prima facie case.[3] Without even an inference that age played any part in an adverse employment decision, allowing a plaintiff to proceed through the entire *McDonnell Douglas* analysis would be ultimately futile. As the Sixth Circuit correctly noted citing this Court's reasoning in *O'Connor*, the required prima facie inference "cannot be drawn from the replacement of one worker with another worker insignificantly younger." *Grosjean*, 349 F.3d at 336, citing *O'Connor*, 517 U.S. at 313, 116 S. Ct. 1307.

The Sixth Circuit examined the post-*O'Connor* jurisprudence carefully in deciding where to draw the line.[4]

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3. It bears noting that the district court has already ruled that FirstEnergy's legitimate nondiscriminatory reason for its action – Grosjean's poor performance – was *not* pretextual. Thus, even assuming that Grosjean fulfilled his prima facie case, his claim still fails.

4. Grosjean is incorrect when he states that the Sixth Circuit recognized that "no other Circuit has ever established a bright-line test." (Petition, at 9). The Sixth Circuit clearly noted and discussed the Seventh Circuit's bright-line rule of ten years. *See Grosjean*, 349 F.3d at 339, citing *Hartley v. Wisconsin Bell*, 124 F.3d 887 (7th Cir. 1997).

An age difference of ten years or more is generally sufficient for an age discrimination plaintiff to move past the prima facie stage. *See, e.g., Carlton v. Mystic Transp.*, 202 F.3d 129, 135 (2d Cir. 2000); *Brown v. Metropolitan Opera Ass'n*, 192 F.3d 310, 317 (2d Cir. 1999); *Showalter v. University of Pittsburgh Med. Ctr.*, 190 F.3d 231, 236 (3d Cir. 1999); *Sempier v. Johnson & Higgins*, 45 F.3d 724, 729-30 (3d Cir. 1995); *O'Connor v. DePaul Univ.*, 123 F.3d 665, 669-70 (7th Cir. 1997); *Weigel v. Baptist Hosp.*, 302 F.3d 367, 375 (6th Cir. 2002); *Bush v. Dictaphone Corp.*, 161 F.3d 363, 368 (6th Cir. 1998); *Barnett v. Department of Veterans Affairs*, 153 F.3d 338, 341 (6th Cir. 1998); *EEOC v. Board of Regents of Univ. of Wisc. Sys.*, 288 F.3d 296, 303 (7th Cir. 2002); *Miller v. Borden*, 168 F.3d 308, 314 (7th Cir. 1999); *Baron v. City of Highland Park*, 195 F.3d 333, 340 (7th Cir. 1999); *Keathley v. Ameritech Corp.*, 187 F.3d 915, 923-24 (8th Cir. 1999); *Roxas v. Presentation Coll.*, 90 F.3d 310, 316 (8th Cir. 1996); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 917 (9th Cir. 1996). When it comes to age differences of less than ten years, however, some courts have found that such a difference is not significant enough for the prima facie case in the absence of any other evidence. *See, e.g., Williams v. Raytheon Co.*, 220 F.3d 16, 20 (1st Cir. 2000); *Cramer v. Intelidata Techs. Corp.*, 168 F.3d 481, 1998 WL 911735 (4th Cir. 1998); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 619 (7th Cir. 2000); *Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1412 & n.6 (8th Cir. 1997); *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1166 (10th Cir. 2000); *Dunaway v. International Brotherhood of Teamsters*, 310 F.3d 758, 767 (D.C. Cir. 2002). Only the Ninth Circuit

and the Eleventh Circuits deviate from these general principles with any regularity.[5]

The Sixth Circuit's decision in *Grosjean* is an appropriate method of bringing order to the analysis of the cases where the replacement worker is less than ten years younger than the plaintiff.[6] This is not a "harsh" rule, as Grosjean claims. In so stating, he ignores case law from other circuits refusing to find a prima facie case where the age difference was *greater* than six years. Indeed, the Sixth Circuit examined the case law in order to determine an equitable basis for articulating the fourth prong. Six years is more generous to plaintiffs than seven, or more years. Grosjean really complains that the Sixth Circuit did not pick five, four, three, two, one years, or no age difference.

Grosjean misconstrues the Sixth Circuit's standard articulated in *Grosjean*. It certainly does not mean that any plaintiff replaced with someone six years younger or less

5. Indeed, state courts have also developed ways of interpreting analogous state anti-discrimination statutes. For instance, the Ohio Supreme Court recently overruled its precedent that an age discrimination plaintiff cannot fulfill a prima facie case if he is replaced by someone in the protected class. Now, plaintiffs bringing age discrimination claims under Ohio Revised Code Chapter 4112 may show replacement with someone "substantially younger" in order to fulfill the prima facie case, thus, bringing precedent under Ohio law in line with the *O'Connor* standard. *See Coryell v. Bank One Trust Co., N.A.*, 101 Ohio St. 3d 175, 803 N.E. 2d 781 (2004).

6. Grosjean cites one case advocating a rule that replacement by an *older* employee does not necessarily foreclose a prima facie case of age discrimination. This case appears to no longer be good law in light of this Court's holding in *General Dynamics Land Systems v. Cline*, 124 S. Ct. 1236 (2004)).

automatically loses. The specific holding in this case was that, "in the absence of direct evidence that the employer considered age to be significant, an age difference of six years or less between an employee and a replacement is not significant." *See also, e.g., Williams v. Raytheon Co.*, 220 F.3d 16 (1st Cir. 2000); *Bennington v. Caterpillar, Inc.*, 275 F.3d 654 (7th Cir. 2001) (In cases where the age difference between the plaintiff and the individual treated more favorably is less than ten years, "the plaintiff still may present a triable claim if [he] directs the court to evidence that [his] employer considered [his] age to be significant."), citing *Hartley v. Wisconsin Bell, Inc.*, 124 F.3d 887, 893 (7th Cir. 1997); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612 (7th Cir. 2000). Thus, if a plaintiff had *any* direct evidence that age played a part in the adverse employment decision or his employer considered age to be significant, the amount of age difference between the plaintiff and his replacement would be of no consequence.

The Sixth Circuit's rule is by no means as harsh as Grosjean incorrectly implies. It simply requires that an age discrimination plaintiff point to something besides an accident of birth or few years of age difference to raise an inference that age discrimination occurred. Under the Court's holding in *Grosjean*, if a plaintiff alleges direct evidence at the outset and competently demonstrates such evidence at the summary judgment stage, he would still be permitted to proceed to trial, even though the age difference is less than six years.

An age discrimination case is necessarily about the birth order of two individuals. It naturally follows that for age discrimination to have occurred, any slight disparity in age should not be sufficient to raise suspicion that discriminatory

decision-making occurred. Indeed, unless a replacement worker and a plaintiff were born on the same day at the same time, there will always be a difference in ages. A plaintiff cannot carry the prima facie burden simply by offering evidence of an employer's choice of a younger employee. This Court in *O'Connor* instructed that an ADEA plaintiff has not established a prima facie case without producing "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion. . . ." *O'Connor*, quoting *Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). Thus, it is not the replacement by merely a younger person that creates the inference, but the replacement by one "substantially younger" that "is a far more reliable indicator of age discrimination."

In the instant case, Grosjean has offered no direct evidence of age discrimination. Indeed, he presents nothing besides a birth order separated by only a few years to support his claim that FirstEnergy's decision was due to his age. In his Petition to this Court, he attempts to extrapolate evidence of discrimination from discussions of an alleged incomplete investigation and other issues which have nothing to do with age. In so doing, he simply reiterates his desire to have one more chance to re-litigate the facts in this case.

CONCLUSION

Here, Grosjean desires another opportunity to re-argue the facts but otherwise puts forth no sound reason for this Court to grant his Petition. His desire for this Court to re-evaluate the use of *McDonnell Douglas* in the age discrimination context was never presented to the courts below. Indeed, the parties and the lower courts unanimously agreed, without objection from Grosjean, that *McDonnell Douglas* was the appropriate framework for analysis. With respect to the six-year standard for proving that his replacement was "substantially younger", Grosjean puts forth no convincing legal justification that the Sixth Circuit's decision should be reviewed by this Court.

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

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